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IN THE

SUPREME COURT OF THE UNITED STATES.

No. Term,

CHELTENHAM AND ABINGTON SEWERAGE COMPANY,
Appellant,

VS.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee.

BRIEF ON BEHALF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM.

THE STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM WAS FILED OUT OF TIME AND SHOULD NOT BE RECEIVED.

The statement Opposing Jurisdiction and Motion to Dismiss or Affirm in this proceeding was filed by the Pennsylvania Public Utility Commission with the Prothonotary of the Supreme Court of Pennsylvania on March 19, 1947, and a copy thereof was received by the attorney for the appellant on the same day.

A copy of the Statement of the Appellant as to jurisdiction of the Supreme Court of the United States was served upon counsel for the Pennsylvania Public Utility Commis-

sion on February 11, 1947 and on February 21, 1947, a document entitled "Statement Opposing Jurisdiction of Supreme Court of the United States" was filed by counsel for the Pennsylvania Public Utility Commission with the Prothonotary of the Supreme Court of Pennsylvania and a copy thereof served upon counsel for appellant. The document which this brief opposes the reception of is in effect a revision of the document entitled "Statement Opposing Jurisdiction of the Supreme Court of the United States" filed and served on February 21, 1947, plus a motion to dismiss or affirm.

Rule 7, paragraph 3 of the Revised Rules of the Supreme Court of the United States provides, inter alia, as follows:

> "A motion by Appellee to dismiss an appeal will be received in advance of the Court's ruling upon the jurisdictional statements only when presented in the manner provided by Rule 12, paragraph 3."

Rule 12, paragraph 3, of said Rules provides as follows:

> "Within 15 days after such service the Appellee may file with the Clerk of the Court possessed of the record, and serve upon the Appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made it may be opposed as provided in Rule 7, Paragraph 3."

Therefore, in view of the fact that the Statement Opposing Jurisdiction and Motion to Dismiss or Affirm filed by the Pennsylvania Public Utility Commission under date of March 19, 1947, was not filed within fifteen days after the service upon the appellee of appellant's "Statement as to Jurisdiction of Supreme Court of the United States", it is obvious that the same was filed out of time and we therefore submit, in accordance with the provisions of Rule 7,

paragraph 3 of the Revised Rules of the Supreme Court of the United States, that it should not be received at this late date.

However, in the event your Honorable Court should be inclined to receive the said statement and motion in spite of the lateness of its filing, appellant desires to submit the following brief in opposition thereto.

I.

The statements contained in Part I of the Statement Opposing Jurisdiction here involved are substantially correct, with the following exceptions:

(1) In the second paragraph it is stated that the company did not follow the Commission order of August 30, 1935, but appealed to the Superior Court of Pennsylvania, which "modified" the findings of the Commission. We submit that the use of the word "modified" in this connection is entirely erroneous for the reason that the Superior Court expressly reversed the said order of the Commission in the following language:

> "The order of the Public Service Commission is reversed."

We submit that this is quite material in considering appellant's contention that the Commission Order of August 30, 1935, became a nullity as the result of the reversal thereof by the Superior Court, and that to hold that reparations began to accrue on the date thereof, but are to be measured by the rates which became effective January 1, 1937, as the result of an order of the Commission of November 30, 1936, which followed the said opinion of the Superior Court, is to give life to a nullity, particularly since the said court, by an Act of the Legislature of Pennsylvania approved June 12, 1931, P. L. 530, 66 P. S. 836, was required to inquire not

only whether the order appealed from was reasonable and in conformity with law, but also to determine, "on its own independent judgment", whether the findings made and the valuations and rates fixed by the Commission were reasonable and proper. That Act constituted the Superior Court an arm of the legislature and therefore, when it reviewed the order of the Commission of August 30, 1935, it acted in a quasi-legislative capacity, rather than a quasi-judicial one, and its decision superseded and nullified completely the said order of the Commission.

(2) Also, in the second paragraph of Part I of the Appellee's statement it is stated in effect that the commission issued a new report and order on November 30, 1936, directing a new tariff to be filed, effective January 1, 1937, "in accord with its previous order as modified by the Superior Court". With respect to said statement we incorporate here what has been said above to the effect that the Commission order of August 30, 1935, became a nullity by reason of its reversal by the Superior Court and, therefore, the filing of the tariff ordered by the Commission order of November 30, 1936, could not and was not "in accord" with the said order of August 30, 1935. As a matter of fact, the Commission order of August 30, 1935, allowed a gross annual revenue of only $27,700. whereas the Commission order of November 30, 1936, based upon the Superior Court decision of July 10, 1936 (122 Pa. Superior Ct. 252), allowed a gross annual revenue of $30,050.

(3) Another erroneous statement appears in the fourth paragraph of Part I of appellee's Statement Opposing Jurisdiction to the effect that in this case there are two Commission-made rates "the first being established by an order of October 6, 1930, and the second by an order of August 30, 1935." We agree that there are two rates here involved and that the first was established by a Commission order of October 6, 1930, but the second rate here involved was established by the Commission order of November 30, 1936,

and directed by said order to be made effective as of January 1, 1937.

(4) We agree, as stated in the fifth paragraph of Part I of appellant's statement opposing jurisdiction that the reparations in issue were ordered by the Supreme Court of Pennsylvania on the basis of the Commission's action of August 30, 1935, but this, we submit, had the effect of making retroactive to that date a rate which was not established until November 30, 1936, and not ordered to become effective until January 1, 1937 which determination, as hereinafter discussed, we submit was contrary to the principles established by your Honorable Court in the case of Arizona Grocery Co. vs. Atchison, Topeka and Sante Fe Railway Co., 284 U. S. 370, 52 Sup. Ct. 183.

II.

Part II of Appellee's Statement Opposing Jurisdiction states in effect that the Supreme Court of Pennsylvania in determining the period for which appellant is liable for reparations, applied the principles established by your Honorable Court in Arizona Grocery Co. vs. Atchison, Topeka and Sante Fe Railway Co., 284 U. S. 370, and quotes a number of excerpts therefrom. In reply we submit that the Supreme Court of Pennsylvania has acted contrary to the principles thus established and that perhaps the most important of such principles and the ones upon which the Appellant particularly relies, have been omitted by the Appellee and are as follows:

> "Where the commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as

> to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the commission now holds it should have decided in the earlier proceeding to be a reasonable rate.
>
> * * *
>
> Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed."

Briefly, in the light of said principles, our contention is that in its order of October 6, 1930, the Commission, acting in its quasi-legislative capacity, having authorized the collection by appellant of certain rates designed to yield a gross annual revenue not in excess of $36,140. and subsequently approved a tariff of rates filed as being in compliance therewith and having later, on November 30, 1936, again acting in its quasi-legislative capacity, issued an order establishing new rates to become effective January 1, 1937, the said Commission was without any power or authority, acting in its quasi-judicial capacity, to hold Appellant liable for reparations for a period beginning August 30, 1935, and thus making retroactive to said date the rates which by its order of November 30, 1936, were expressly ordered to become effective on January 1, 1937.

The appellee also states that the Supreme Court of Pennsylvania (344 Pa. 366, 371, 372) stated that the legislative process in Pennsylvania is complete when the Commission finds a new rate and quotes a lengthy excerpt from the said opinion in support of said statement. Be that as it may, we submit that if the quoted language so holds it is erroneous in the light of the Act of the Legislature of Pennsylvania approved June 12, 1931, P. L. 530, 66 P. S. 836, hereinabove referred to, which provides, inter alia, as follows:

> "At the hearing of the appeal, the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law: Provided, however, That in every appeal taken, including those already taken and undetermined, involving a question of the reasonableness of rates, whether such appeal shall have been taken by a complainant or by a public service company, it shall be the duty of the court to consider the entire record of the proceedings before the commission, including the testimony, and, on its own independent judgment, to determine whether or not the findings made and the valuations and rates fixed by the commission are reasonable and proper."

and contravenes the Fourteenth Amendment of the Constitution of the United States in that it is confiscatory and deprives the Appellant of its property without due process of law, denies to the appellant the equal protection of the law, and amounts to a taking of the private property of appellant without authority of law, and furthermore acted contrary to the principles enunciated by your Honorable Court in the leading case of Arizona Grocery Co. vs. Atchison, Topeka and Sante Fe Railway Co., supra.

In Part II of its Statement Opposing Jurisdiction the appellee also states that "it is clear that in the case at bar the appellant utility refused to follow a commission-made rate until after the rate had been reviewed by the Appellate Courts, all in total disregard of the holding of the United States Supreme Court in the Arizona Grocery case, supra, that a Commission acting under this type of statutory power could * * * substitute a new rule of conduct as often as occasion might require". We submit that said statement is a distortion of the fact and the law. As to the fact, the Appellant refused to make effective the rate established by the Commission order of August 30, 1935, and was justified in such refusal by the opinion of the Superior Court of

July 10, 1936, supra, wherein a higher rate was authorized and which is the rate which was made effective, in accordance with the commission order of November 30, 1936, on January 1, 1937. As to the law, we emphatically deny that such refusal was in disregard of the holding of your Honorable Court in the Arizona Grocery case. While your Honorable Court did say that the Commission there could repeal an order "as it effected future action and substitute a new rule of conduct as often as occasion might require", you did not hold that a utility was obliged to comply with such order without any right of appeal.

We submit it is clear beyond a doubt that the Supreme Court of Pennsylvania in fixing August 30, 1935, as the beginning of the period during which Appellant is liable for reparations, instead of following "faithfully the lead of the Supreme Court of the United States" as stated by the appellee, acted contrary to the principles established by your Honorable Court.

III.

In Part III of Appellee's Statement Opposing Jurisdiction it is stated that the Pennsylvania Supreme Court's interpretation of Section 313 (a) of the Public Utility law as procedural is not a violation of the Fourteenth Amendment of the Constitution of the United States and presents no Federal question. With this, of course, Appellant vigorously disagrees, and with the argument Appellee makes in support thereof. We assume that instead of the word "interpretation" the Appellee intended to use the word "application", since the question at issue was really whether Article V, Section 5, of the Public Service Company Law of 1913 or Section 313 (a) of the Public Utility Law of 1937, should be applied, and the Supreme Court of Pennsylvania affirmed the Public Utility Commission's action in applying the latter.

It is appellant's contention that since the proceeding at

bar had its inception upon the filing of a petition for reparations under date of October 17, 1935, more than a year and a half prior to the effective date of the Public Utility Law of 1937, that the proceeding must be considered and disposed of under the law in existence upon the date of such filing, i.e., the Public Service Company Law of 1913, Article V, Section 5 of which, being the section relating to reparations, is quoted in part in Appellee's Statement Opposing Jurisdiction and will not be repeated here. As a matter of fact, the Superior Court of Pennsylvania in the first phase of this proceeding, so held: Cheltenham and Abington Sewerage Company vs. Pa. Public Utility Commission, 146 Pa. Superior Ct. 274, 282.

Article V, Section 5, of the Public Service Company Law of 1913, in brief, provides that only such complainant petitioners as have actually sustained damages and who have filed their complaint or petition within two years from the time when the cause of action accrued, are entitled to reparations, and these provisions, we submit, are definitely and unequivocally substantive in nature and that the Legislature had no power, without violating the constitutional rights of this appellant, to alter these substantive provisions as to a proceeding which had been instituted while the Public Service Company Law of 1913 was in effect.

We submit that to refuse to apply the provisions of the Public Service Company Law of 1913 amounts to confiscation and a violation of Section 1 of Amendment XIV of the Constitution of the United States in that it deprives the appellant of its property without due process of law and further denies to appellant the equal protection of the laws, since under the Public Service Company Law of 1913 only those patrons of a public utility who have filed with the Commission their complaint or petition within two years from the time when the cause of action accrued and only such complainant petitioners who have actually sustained damages, are entitled to reparations, whereas Section 313 (a) of the Public Utility Law of 1937 provides that "any

order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the Public Utility".

Article V, Section 5, of the Public Service Company Law of 1913 did not, as contended by the Appellee, merely provide a procedure to be followed in reparation cases; it actually created and defined rights. Procedural law, we submit, merely prescribes the method of enforcing rights: 36 C. J. 963.

Appellee states in effect in its Statement Opposing Jurisdiction that the application of section 313 (a) of the Public Utility Law of 1937 "did not impose upon appellant any liability greater than that which existed at common law, or than that which existed under the Public Service Company Law of 1913". That statement, we submit, is absolutely contrary to the fact. At the common law only those patrons were entitled to reparations who could prove that they had actually sustained damages. Under the Public Service Company law only those complainant petitioners who have filed their petitions within a period of two years after the cause of action accrued and who have actually sustained damages are entitled to reparations. However, under Section 313 (a) of the Public Utility Law of 1937 all of the patrons subject to the same rate of a public utility are entitled to reparations regardless of whether or not they filed a petition therefor and regardless of any proof of any damages having been sustained by them.

This question is very vital to appellant since the record in this proceeding is absolutely devoid of any proof of damages actually sustained by the complainant petitioners.

CONCLUSION.

In the light of the foregoing we earnestly urge that the motion to dismiss or affirm be dismissed.

Respectfully submitted,

GEORGE HENRY HUFT,

Attorney for Appellant.